

1 IN THE UNITED STATES DISTRICT COURT

2 SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 DEEP MARINE HOLDINGS, INC. § CASE NO. 10-3026-H1-ADV
§ HOUSTON, TEXAS
5 VERSUS § THURSDAY,
§ JANUARY 21, 2010
6 FLI DEEP MARINE, LLC § 3:00 P.M. TO 4:13 P.M.

7
8 TEMPORARY RESTRAINING ORDER HEARING

9 BEFORE THE HONORABLE MARVIN ISGUR
10 UNITED STATES BANKRUPTCY JUDGE

11 APPEARANCES:

12 FOR PLAINTIFF: SEE NEXT PAGE

13 FOR DEFENDANT: SEE NEXT PAGE

14 COURT RECORDER: SUZANNE GUEVARA

15 COURT CLERK: RISHONA SMITH

16
17
18
19
20 PREPARED BY:

21 JUDICIAL TRANSCRIBERS OF TEXAS, INC.
22 P.O. Box 925675
Houston, Texas 77292-5675
23 Tel: 281-328-6179 ▼ Fax: 281-462-2016
www.judicialtranscribers.com

24 Proceedings recorded by electronic sound recording;
25 transcript produced by transcription service.

APPEARANCES:

FOR THE PLAINTIFFS/DEBTORS,
DEEP MARINE HOLDINGS, INC.:

MARCY E. KURTZ, ESQ.
JASON G. COHEN, ESQ.
BRACEWELL & GIULIANA, LLP
711 LOUISIANA ST., STE 2300
HOUSTON, TX 77002
713-221-1416

FOR CREDITOR'S COMMITTEE:

PAUL MOAK, ESQ.
MCKOOL SMITH
600 TRAVIS ST., SUITE 7000
HOUSTON, TX 77002
713-485-7300

APPEARING TELEPHONICALLY:

FOR THE DEFENDANT,
FLI DEEP MARINE, LLC,
BRESSNER PARTNERS, LTD.,
LOGAN AND HARLEY LANGBERG:

ANTHONY J. PADUANO, ESQ.
JASON SNYDER, ESQ.
PADUANO WEINTRAUB, LLP
1251 AVENUE OF THE AMERICAS
SUITE 920
NEW YORK, NY 10020
212-785-9100

FOR NASSER KAZEMINY:

LISA GOLDEN, ESQ.
JASPAN SCHLESINGER LLC
300 GARDEN CITY PLAZA, 5TH FL.
GARDEN CITY, NY 11530
516-746-8000

FOR OTTO CANDIES, LLC,
OTTO CANDIES, III,
CANDIES SHIPBUILDERS, LLC:

KARL J. ZIMMERMAN, ESQ.
BALDWIN HASPEL BURKE & MAYER
SUITE 2200 ENERGY CENTER
1100 POYDRAS ST.
NEW ORLEANS, LA 70163
504-569-2900

1 FOR NASSER KAZEMINY,
2 DANIEL ERICSON, AND
3 JK HOLDINGS:

JOSEPH M. WINDLER, ESQ.
WINTHROP & WEINSTINE, PA
225 S. 6TH ST., #3500
MINNEAPOLIS, MN 55402
612-604-6400

5 FOR NASSER KAZEMINY AND
6 CANDIES ENTITIES:

TONY DAVIS, ESQ.
BAKER BOTTS, LLP
ONE SHELL PLAZA
910 LOUISIANA ST.
HOUSTON, TX 77002
713-229-1547

1		<u>EXHIBITS</u>		
2	<u>PLAINTIFFS/DEBTORS:</u>	<u>Marked</u>	<u>Offered</u>	<u>Received</u>
3	Exhibit Number 1	10	16	17
	Exhibit Number 2	11	16	17
4	Exhibit Number 3	11	16	17
	Exhibit Number 4	12	16	17
5	Exhibit Number 5	12	16	17
	Exhibit Number 6	12	16	17
6	Exhibit Number 7	13	16	17
	Exhibit Number 8	13	16	17
7	Exhibit Number 9	13	16	17
	Exhibit Number 10	13	16	17
8	Exhibit Number 11	14	16	17
	Exhibit Number 12	15	16	17
9	Exhibit Number 13	15	16	17
	Exhibit Number 14	16	16	17
10	Exhibit Number 15	15	16	17

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 HOUSTON, TEXAS, THURSDAY, JANUARY 21, 2010, 3:00 P.M.

2 **THE COURT:** All right. Please be seated.

3 Okay. We're here on the Temporary
4 Restraining Order hearing in the Deep Marine Holdings case.
5 It's Adversary proceeding 10-3026. We'll take appearances
6 in court, then we'll take appearances on the telephone.

7 **MS. KURTZ:** Good afternoon, Your Honor. Marcy
8 Kurtz with Jason Cohen, here on behalf of the Debtor and the
9 Plaintiffs in the adversary proceeding.

10 **THE COURT:** All right.

11 **MR. MOAK:** Good afternoon, Your Honor. Paul Moak,
12 M-O-A-K, on behalf of the Creditor's Committee.

13 **THE COURT:** All right. Anyone else appearing here
14 in court?

15 (No audible response.)

16 **THE COURT:** All right. On the telephone, we have
17 an appearance from New York. Who would that be?

18 **MR. PADUANO:** Your Honor, it's Anthony Paduano and
19 Jason Snyder, dialing in right now for FLI Deep Marine, LLC,
20 Bressner Partners, Logan Langberg, Harley Langberg.

21 **THE COURT:** All right. Thank you.

22 **MR. PADUANO:** And Your Honor, I've submitted a pro
23 hac vice application and also on the phone is -- or dialing
24 is in Lisa Golden from the Jaspan Schlesinger firm, also in
25 New York.

1 **THE COURT:** All right.

2 **MR. PADUANO:** At some point will enter her
3 appearance in this case, as well.

4 **THE COURT:** Okay. I probably have both of you-all
5 available on the phone right now.

6 Ms. Golden, can you hear me? Ms. Golden, are
7 you there?

8 (No audible response.)

9 **MR. PADUANO:** She's supposed to dial in, Your
10 Honor. I don't know if she's here yet or not.

11 **THE COURT:** I'm showing I've got two people from
12 your firm both on the phone, so I assume she's somewhere.

13 **MR. PADUANO:** Thank you, Your Honor.

14 **THE COURT:** And then I have somebody from the 516
15 area code?

16 **MR. PADUANO:** That's her, Your Honor.

17 **MS. GOLDEN:** Good afternoon, Your Honor.

18 **THE COURT:** Thank you. Who's here from the 516?

19 **MS. GOLDEN:** Your Honor?

20 **THE COURT:** Yes.

21 **MS. GOLDEN:** Hi. The 516 number is Lisa Golden.

22 **THE COURT:** All right. Thank you.

23 **MS. GOLDEN:** And we are in the process of also
24 preparing our pro hac vice motion.

25 **THE COURT:** All right. Let's not -- anyone who

1 wants to appear in a TRO hearing can appear without the
2 necessity of the pro hac. I'm not going to get too tied up
3 on that, but thank you for telling me.

4 **MS. GOLDEN:** Thank you, Your Honor.

5 And then from, I think, New Orleans, who do
6 we have?

7 **MR. ZIMMERMAN:** Karl Zimmerman from Baldwin Haspel
8 Burke & Mayer, representing Otto Candies, LLC, Otto Candies,
9 III, and Candies Shipbuilders, LLC, which is a creditor in
10 the bankruptcy proceeding.

11 **THE COURT:** Thank you.

12 **MR. ZIMMERMAN:** I also filed a pro hac vice
13 application.

14 **THE COURT:** All right. I haven't seen any for HUX
15 yet, so same rule for you.

16 In the 612 area code? Do we have anybody
17 from 612 participating? Hold on. I didn't click it right.
18 Let me try that from the 612?

19 **MR. WINDLER:** Your Honor?

20 **THE COURT:** Yes. Who do we have?

21 **MR. WINDLER:** Joseph Windler with the law firm of
22 Winthrop and Weinstine in Minneapolis. I represent Nasser
23 Kazeminy, JK Holdings, DMT Ventures, Daniel Ericson, John
24 Hudgeons, and Eugene Diploma in the Delaware proceedings and
25 the Kazeminy's in the bankruptcy proceeding, as well.

1 **THE COURT:** Thank you.

2 And finally, we have someone from Houston,
3 713-668 exchange?

4 **MR. DAVIS:** Hi, Your Honor. Tony Davis. My plane
5 literally just landed. I'm here on behalf of the Kazeminy
6 and Candies entities.

7 **THE COURT:** Thank you. All right. I've read the
8 application and some of the exhibits. There's an opposition
9 brief that I did not see until I just walked out and I now
10 see it on my screen.

11 **MS. KURTZ:** Did Your Honor want to take a minute
12 to read that?

13 **THE COURT:** Yeah. I need to. I did not realize
14 that had been filed and I apologize.

15 **MS. KURTZ:** That's fine. No problem. Let me --

16 **THE COURT:** What time did that come in?

17 **MR. PADUANO:** Your Honor, there's also -- Anthony
18 Paduano, Your Honor. There's also an affidavit with
19 probably substantial exhibits that we've also put on the
20 PACER.

21 **THE COURT:** Right. That's part of that opposition
22 brief, right?

23 **MR. PADUANO:** There are two separate instruments,
24 Your Honor, two separate documents.

25 **MS. KURTZ:** The brief, Your Honor, is about 16

1 pages and then there's a rather -- you know, about an inch
2 stack of exhibits attached to an affidavit, which was a
3 document filed just after the memorandum.

4 **THE COURT:** Right. I think the way it got filed
5 -- and I just want to make sure I'm reading the right thing
6 -- is that the affidavit got filed along with the brief as
7 an attachment to the brief. I just want to be sure that's
8 what you want me to read? And I'm looking -- it got filed
9 at 2:59, so I'm not going to feel too bad that I didn't get
10 to read it before I got out here.

11 **MR. PADUANO:** That's fine. No, Your Honor, of
12 course not. I'm looking at Docket Number 146 that --

13 **THE COURT:** I've got document 14 is the brief.

14 **MR. PADUANO:** Correct.

15 **THE COURT:** And then it has attached to it an
16 affidavit and then the affidavit has attached to it, 21
17 exhibits.

18 **MR. PADUANO:** Correct, Your Honor, yes.

19 **THE COURT:** That's it? Okay. Let me just step
20 down and let me go read that. I'm just going to have
21 everybody hold on the phone while I go back and read it.
22 I'm sure this will be ten or 15 minutes and I'll come back
23 and we'll restart the hearing. Thank you.

24 **(Recess taken from 3:07 p.m. to 3:18 p.m.)**

25 **THE COURT:** Okay. Ms. Kurtz, let's go ahead.

1 **MS. KURTZ:** Thank you, Your Honor. Mr. Moak may
2 have just stepped to the men's room. He'll be in just any
3 minute. I just wanted to tell the Court we're ready to go
4 though.

5 **THE COURT:** Okay.

6 **MS. KURTZ:** Your Honor, I think that -- I've been
7 debating here. I think I'm just going to start in
8 chronological order how this began and bring us to the
9 current, which will then lead into why we're here today, why
10 we're entitled to a Temporary Restraining Order and meet the
11 standard for that and the specific relief we're asking the
12 Court for today, based on the pleadings that are live in the
13 Delaware action.

14 If the Court has the Exhibit Book that was
15 prepared by the Plaintiffs/Debtors in front of you, I'm
16 going to just highlight through what those exhibits are.
17 That will make more sense when I offer those exhibits into
18 evidence, Your Honor.

19 **(Plaintiffs/Debtors Exhibit Number 1 marked for**
20 **identification.)**

21 **MS. KURTZ:** If you'll look at Exhibit Number 1,
22 the actions between the Delaware Defendants -- I'm sorry,
23 the Delaware Plaintiffs, who are the Defendants in the
24 adversary proceeding, started when they filed a Verified
25 Complaint, which we have as Exhibit Number 1, alleging what

1 they claim on their own, if you look at page 1 to be a
2 shareholder's derivative action claims brought against the
3 Debtors and certain of the other individual Defendants that
4 have been named in the Delaware action.

5 **(Plaintiffs/Debtors Exhibit Number 2 marked for**
6 **identification.)**

7 **MS. KURTZ:** And that matter, Your Honor, if you'll
8 notice Exhibit Number 2, was dismissed by the court -- by
9 the Chancery Court of Delaware for a failure to follow
10 certain of the rules or to state it even more objectively.
11 Apparently there was a demand by the Plaintiffs in that case
12 for certain information. The Defendants had not had a
13 sufficient time to respond to that demand for information.
14 The Chancery Court said, "I'm going to dismiss this action
15 and give them a chance to respond."

16 **(Plaintiffs/Debtors Exhibit Number 3 marked for**
17 **identification.)**

18 **MS. KURTZ:** Shortly after doing that, Your Honor,
19 if you'll look at Exhibit Number 3? Plaintiff's First
20 Amended Petition was filed in the State District Court in
21 Harris County, Texas. It is virtually identical to Exhibit
22 Number 1 and it was filed two months after the dismissal of
23 Exhibit Number 1 and after the entry of the Order, Exhibit
24 Number 2. These claims are also in derivative in nature.
25 They say so themselves on page 3 and otherwise in that

1 Complaint. They are very similar, if not verbatim, in many
2 cases to the allegations that are found in Exhibit Number 1.

3 **(Plaintiffs/Debtors Exhibit Number 4 marked for**
4 **identification.)**

5 **MS. KURTZ:** There was an Amended Motion to Dismiss
6 and an Order granting that dismissal, which we've marked as
7 "Exhibit Number 4," where the Defendants in the State Court
8 action in Texas, which were the same as the Defendants in
9 the Delaware -- the first Delaware action, where they sought
10 and obtained a dismissal of the Texas suit because the
11 claims were derivative in nature and that the Plaintiff
12 lacked standing to bring them.

13 **(Plaintiffs/Debtors Exhibit Numbers 5 and 6 marked for**
14 **identification.)**

15 **MS. KURTZ:** Exhibit Number 5 is the live
16 Complaint. Exhibit Number 6 is what we've called a
17 "copycat" or a "Me, Too, Complaint," filed by an additional
18 Plaintiff, the same Defendants. And that -- those are the
19 two actions, Your Honor, 5 and 6, that we're here on today
20 where the Debtors are asking the Court to enter a Temporary
21 Restraining Order until such time as you can determine
22 whether the claims that have been pled in Exhibits Numbers 5
23 and 6 are property of the estate or otherwise stayed as
24 being direct actions against the Debtor.

25 **(Plaintiffs/Debtors Exhibit Number 7 marked for**

1 **identification.)**

2 **MS. KURTZ:** Exhibit Number 7, Your Honor, is the
3 Suggestion of Bankruptcy. As you know, this bankruptcy case
4 was filed on December 4th, here in this Court, and a
5 Suggestion of that Bankruptcy was filed with the Chancery
6 Court in Delaware advising all of the parties and the Court
7 that the action should be stayed.

8 **(Plaintiffs/Debtors Exhibits Numbers 8 and 9 marked for**
9 **identification.)**

10 **MS. KURTZ:** Exhibits Numbers 8 and 9, Your Honor,
11 are the current as of the submission of the Exhibit
12 Notebook. Case histories are what we call "Docket Sheets"
13 for the live actions that Complainant Number -- Exhibit
14 Number 5 and similarly, the one that's at Exhibit Number 6.
15 Those are Plaintiffs' Exhibits Numbers 8 and 9.

16 **(Plaintiffs/Debtors Exhibit Number 10 marked for**
17 **identification.)**

18 **MS. KURTZ:** In response to the Suggestion of
19 Bankruptcy, there wasn't a pleading filed, but instead, the
20 Plaintiffs in the Delaware action prepared a letter to the
21 Court to the Vice Chancellor, dated December 8th, that's
22 been attached as "Exhibit Number 10," advising the Court
23 that they intended to pursue their claims against the
24 non-debtors.

25 **(Plaintiffs/Debtors Exhibit Number 11 marked for**

1 **identification.)**

2 **MS. KURTZ:** In response to that letter, the
3 Debtor's Counsel in the Delaware action, Mr. K.B. Battaglini
4 of the Greenberg Traurig Law Firm, who is -- has a motion
5 pending in this Court for retention of special counsel to
6 continue that -- it's necessary to continue that
7 representation -- filed a response to the December 8th
8 letter, which you'll find at Exhibit Number 11, advising the
9 Delaware Court, not only of the automatic stay against the
10 Debtors, but also as to the parties related to the Debtors
11 where the claims were aggregated and also advising that
12 Court and all of the parties that the claims were derivative
13 in nature.

14 As -- if you'll go back, Your Honor, I'll do
15 this in the argument now, but if you'll go back and review
16 Exhibits Number 8 and 9, notwithstanding the Suggestion of
17 Bankruptcy filed December 4th and the letter December 11th
18 indicating that the Debtors' view was that the claims
19 alleged in the Delaware action were derivative in nature,
20 the Plaintiffs continued to prosecuted their claims, not
21 again the Defendants, but against all of the non-debtor
22 Defendants, notwithstanding the Debtors' position and
23 statement to the Court that they belong to the Debtor and
24 that the Plaintiffs should not proceed.

25 **(Plaintiffs/Debtors Exhibit Number 12 marked for**

1 **identification.)**

2 **MS. KURTZ:** The -- as a result of that, Your
3 Honor, I sent a letter, which is Exhibit Number 13, to all
4 of the Counsel in the Delaware action -- I'm sorry, Exhibit
5 Number 12. I sent a letter to all of the Delaware Counsel
6 advising them not to proceed and if they did, that we would
7 come to this Court and seek injunctive relief, that we
8 prefer not to do that, that it was the Debtors' position, as
9 stated by Mr. Battaglini already, that the claims that they
10 pled were derivative in nature and belonged to the estate
11 and should be pursued by the estate, or a designee of the
12 estate.

13 **(Plaintiffs/Debtors Exhibit Number 13 marked for**
14 **identification.)**

15 **MS. KURTZ:** The response to that was Exhibit
16 Number 13, where they said essentially they intended to
17 continue to prosecute those claims and causes of action.

18 **(Plaintiffs/Debtors Exhibit Number 15 marked for**
19 **identification.)**

20 **MS. KURTZ:** If you'll skip to Exhibit Number 15,
21 which was added in an Amended Exhibit List, Your Honor,
22 today the Plaintiffs' Counsel wrote another letter to Vice
23 Chancellor Strine, reiterating that they intended to go
24 forward with their claims against the non-debtor Defendants
25 and arguing that the stay did not apply.

1 **(Plaintiffs/Debtors Exhibit Number 14 marked for**
2 **identification.)**

3 **MS. KURTZ:** Exhibit Number 14, Your Honor, is just
4 various emails indicating that notice of today's hearing was
5 appropriate under the circumstances for a Temporary
6 Restraining Order.

7 **THE COURT:** All right.

8 **MS. KURTZ:** I'd move for submission of Exhibits 1
9 through 15, Your Honor.

10 **(Plaintiffs/Debtors Exhibits Numbers 1 through 15**
11 **offered into evidence.)**

12 **THE COURT:** All right.

13 **MS. KURTZ:** They've been sent to all of the
14 parties. To my knowledge, on the phone, they were sent to
15 them along with the Exhibit List. They were sent to them by
16 PDF yesterday.

17 **THE COURT:** All right. Let me hear from
18 Mr. Paduano to start with.

19 **MR. PADUANO:** Your Honor, the documents are all to
20 our eyes authentic. I don't have any objection as to that.
21 We're a little bit handicapped, given the shortness of
22 notice we've had for the hearing to make -- complete so we'd
23 ask the Court at some point for leave to make a supplemental
24 -- to accept the documents introduced for completeness, but
25 as to these exhibits, we don't have objection.

1 **THE COURT:** Thank you. We're going to admit them
2 solely for the purpose of the TRO Hearing, not for the
3 purpose of any other hearing, so that if you do need to
4 offer something for completeness, whether we issue the TRO
5 or not, we're obviously going to get to some preliminary
6 injunction hearing, and at that point, all your objections
7 will be preserved and you can offer them at that point, if
8 you need to.

9 **(Plaintiffs/Debtors Exhibits Numbers 1 through 15**
10 **received in evidence.)**

11 **MR. PADUANO:** Thank you.

12 **THE COURT:** Thank you.

13 **MS. KURTZ:** Thank you. Your Honor, we're here
14 today for Temporary Restraining Order Hearing. We're not
15 asking the Court to decide on the merits today, you know, on
16 two days' notice without adequate time for the Adversary
17 Defendants to respond, to determine unequivocally that the
18 claims -- although we think you could, we're not asking you
19 to do that, that they are unequivocally derivative claims.
20 It is the Debtors' belief based on admissions by the
21 Delaware Plaintiffs themselves, by comments from the
22 Delaware Court, and by following the case law, that the
23 claims are very likely derivative in nature and belong to
24 the estate.

25 And if the Plaintiffs in the Delaware action

1 are allowed to proceed on those actions, which they've
2 indicated as late as today, that they intend to do, absent
3 an Order from this Court, that there will be irreparable
4 harm and injury to the Debtor.

5 And the reason for that would be this is not
6 something where you can say -- proceed and if I'm wrong, we
7 can sue you and we can get a monetary damage. We're talking
8 about litigation proceeding, so to the extent those claims
9 are owned by someone, and we are not able to prosecute them,
10 that would be an irreparable injury. That is, in essence,
11 someone taking over control and direction of an asset of the
12 Debtors' estate where we would have no control over how
13 those proceeded.

14 The other -- if there's -- Exhibits Numbers 8
15 and 9, I think, Your Honor, if you go through those, contain
16 adequate evidence for the Court to show that there is an
17 emergency at hand here. There is discovery outstanding.
18 There are answers that are due by these non-debtor
19 Defendants. The Court -- I think it's called the "Court of
20 Chancery" in Delaware and the Vice Chancellor there has
21 already entered a ruling that the discovery should proceed
22 at an expedited basis.

23 So if this Court does not enter a restraining
24 order, I think that that lawsuit in Delaware will just
25 proceed far enough down the path that when this Court makes

1 a determination that the claims in the underlying action are
2 property of the estate, we won't be able to "unring the
3 bell."

4 The standard, Your Honor, is irreparable
5 injury, whether there's an adequate remedy at law,
6 likelihood that we would prevail on the merits, once there
7 is a trial, a balance of hardships and the effect on public
8 interest.

9 It's clear that the Plaintiffs intend to
10 proceed absent an Order of the Court. The injury, Your
11 Honor, I've indicated is irreparable in that it can't be
12 remedied by monetary recompense. There's no way to say,
13 "We'll pay you back later, if you just let us proceed
14 today."

15 The Delaware Plaintiffs have argued in their
16 response that they should be allowed to proceed and if at
17 some point in the future you decide the claims are
18 derivative, well they will have been prosecuting those on
19 behalf of everybody. But I think if those claims belong to
20 the estate, the estate can do with them as they please.
21 They could be turned over to the Committee, which, in fact,
22 has already been discussed to the Committee Counsel to
23 investigate and prosecute those claims, as may be
24 appropriate. They could be compromised, settled. They
25 could be negotiated in some way as part of a plan. There

1 are a lot of different things, strategy or otherwise, that
2 could take place if the Debtors themselves were able to
3 manage their own assets.

4 The no adequate remedy at law, Your Honor, is
5 very similar to the irreparable injury. Sometimes those two
6 are combined when the Court analyzes whether the standard
7 has been met. Here again, no monetary reward would do, no
8 "unringing of the bell."

9 The substantial likelihood of success on the
10 merits is the most important element. I'd like to reserve
11 that for last so I could go through the actual causes of
12 action, Your Honor.

13 The balance of the hardships: The only
14 injury to the Delaware Plaintiffs, Your Honor, would be a
15 delay of time. The injury to the Debtors is an irreparable
16 loss of their legal right to pursue their claim. It would
17 be like giving a hard asset away to someone and saying,
18 "Sell it," and we could always take the money later, but
19 they may not -- they may not know the market.

20 They may not sell it for the right price.
21 They may not -- we don't know what they would do with it.
22 And so here, particularly because we're not talking about a
23 hard asset, but a legal right, we have no idea what the
24 strategy would be, or how that litigation would proceed, or
25 whether there would be benefit to other creditors that might

1 be reaped, if, for example, the Unsecured Creditors
2 Committee Counsel were to pursue those claims for the
3 benefit of all of the creditors of the estate.

4 The truth is, there's probably no harm to the
5 public interest. This is always a difficult element to meet
6 with respect to a TRO, I think, in a Bankruptcy Court, but I
7 think it is always in the public's interest to maintain the
8 status quo until the Court of proper jurisdiction can
9 determine whether there's a right that should be preserved
10 here, and that's what we're trying to do.

11 With respect to substantial likelihood of
12 success on the merits, Your Honor, you have to -- this Court
13 has already written an opinion, which is squarely on point
14 with our facts here. I don't know that we could have a set
15 of facts any more exact to the facts in the Court's case,
16 Dexterity Surgical, at 365 Bankruptcy 690. In that case,
17 the Court looked to the standard set forth in Tooley versus
18 Donaldson. It's *Tooley versus Donaldson Lufkin* -- and I can
19 never pronounce the last name, at 845 A2d 1031, Delaware,
20 2004.

21 The Fifth Circuit has instructed the Courts
22 in the Southern District to look to state law to determine
23 if claims are direct or derivative and this Court has held
24 in *Dexterity* that actions involving the internal affairs of
25 the "corporation" are governed by the law of the state of

1 incorporation. Here the claims brought by the Delaware
2 Plaintiffs focus on Deep Marine Holdings, Inc., which is a
3 Delaware corporation.

4 From this point, Your Honor, the facts of the
5 underlying lawsuit in Delaware are almost exactly like the
6 facts in *Dexterity*. What the Court found in *Dexterity* and
7 following the *Tooley* standard, is that the proper analysis
8 to distinguish between direct and derivative actions should
9 be based on who actually suffered the harm, the corporation
10 or the person bringing the claim and who would receive the
11 benefit if the harm was undone. In other words, once there
12 is a remedy and a recovery, who is going to get that? The
13 individual shareholders or the Debtor themselves?

14 And seven, analyzing the first prong, it's
15 helpful to ask -- in other words, when -- not just who the
16 name is on the pleading. You know, "I've sued in my own
17 name and I say that I've been injured," but instead, it's
18 helpful to ask, "Has the Plaintiff demonstrated that they
19 can prevail without showing that there was an injury to the
20 corporation?"

21 And if you go through the specific causes of
22 action in the underlying Delaware case, you can see that
23 they are either directly against the Debtor and/or stayed
24 and we don't really need a TRO, there's been no indication
25 by the Plaintiffs in the Delaware action that they intend to

1 proceed against the Debtor, for example, on the appraisal
2 rights claims. So while the first cause of action is for
3 appraisal rights against DMT, we don't need a TRO for that.
4 That would be automatically stayed.

5 The second cause of action, Your Honor, and
6 similarly, causes of action two through six, the first --
7 the cause of action two is a claim against the officers and
8 directors for breaches of their fiduciary duty. And then
9 three, four, five and six are -- I was going to say
10 "clever," but I don't mean to be pejorative -- sort of
11 interesting variations of breaches of fiduciary duty.

12 The third cause of action is a claim against
13 the controlling shareholder Defendants for their breaches of
14 fiduciary duty.

15 The fourth is a claim against the controlling
16 shareholder Defendants for unjust enrichment, which they got
17 as a result of that breach of fiduciary duty.

18 The fifth one is the claim against the
19 controlling shareholder Defendants for aiding and abetting a
20 breach of fiduciary duty.

21 And the sixth one is a claim against the
22 officers and directors for aiding and abetting a breach of
23 fiduciary duty.

24 So they're all really a breach of fiduciary
25 duty claim. And so they allege in their Complaint, Your

1 Honor, in all of them this -- the ones that are live and in
2 all of the preceding ones that were dismissed where they
3 clearly represented in their pleadings themselves that they
4 were holding derivative claims, that the officers and
5 directors and the other individuals that have been sued,
6 were aiding and approving DMT actions for the private
7 purposes of the controlling shareholders, that would be the
8 Otto Candies entities and also the Kazeminy entities.

9 These actions allegedly include gross misuse
10 of corporate funds, self dealing, corporate looting, failure
11 to follow corporate formalities, gross mismanagement. They
12 have alleged very specific things, like money going out of
13 the company to some Senator's wife. They've alleged that
14 there were improper dealings on commercial transactions
15 between the insiders and the company that have caused the
16 company to take on additional debt, which then enabled that
17 particular shareholder to flip that debt to more equity than
18 he was entitled to.

19 But all of those causes of action, you have
20 to prove that there was some damage to the company, and if
21 there was a remedy, if there has been money transferred
22 improperly -- for example, from the company to the Senator's
23 wife -- that would be a fraudulent transfer and the money
24 for that would not go back to the shareholders, who may have
25 been harmed from that, it would go back to the company

1 because everybody -- all of the creditors and parties-in-
2 interest of the Debtor would be harmed by that and would be
3 entitled to reap the benefit of that money coming back into
4 the Debtor.

5 And so, the Plaintiffs, while they may have
6 been injured, they have been no differently injured than
7 people similarly situated on whose behalf they should be
8 bringing the claims and the remedy would benefit everyone.
9 It would -- the money would come back to the Debtor and the
10 proceeds -- the remedy for that would benefit all of the
11 Creditors and parties-in-interest of the Debtor.

12 Your Honor, the seventh -- I just was going
13 to reiterate that argument. I think I can go through it
14 with each of the other claims, but I think two, three, six
15 are identical, Your Honor. They are just some version of
16 the breach of fiduciary duty.

17 The seventh cause of action, Your Honor, is a
18 claim against the Defendants in the Delaware action for
19 fraud through active concealment of material facts. And you
20 know, I was -- you know, honestly I would say this claim is
21 a little harder to call, but where I think the other ones
22 are absolutely and unequivocally derivative actions for the
23 benefit of the estate, I would say that the seventh cause of
24 action is probably both, something that would be a
25 derivative action for the benefit of all of the creditors

1 and something where the minority shareholders could argue
2 that the failure to disclose certain information was
3 directly harmful to them, so there would be an overlap
4 there.

5 But again today, Your Honor, I don't know
6 that we have to make a concrete decision. We have to show
7 that there is a high likelihood that we would appeal on the
8 merits when there is an actual trial and the fact even that
9 this cause of action could be either one and the same with
10 the eighth one, Your Honor. Maybe the eighth one -- or the
11 seventh one less so than the eighth one -- where there is --
12 where there could be both. I mean, I don't know that it
13 would -- I don't think that there is a single claim in here
14 that belongs just to the Defendants, but I think that seven
15 and eight may arguably belong to both.

16 But clearly you could show on the fraud
17 through active concealment of material facts, that it is the
18 Debtor that would reap the benefit, if there was a remedy.
19 The -- I think the argument is that the officers and
20 directors falsified corporate documents to cover up improper
21 payments to third parties. I think this was the cause of
22 action where they alleged that there were payments to Otto
23 Candies that shouldn't have been made and that that enabled
24 the company to increase the -- carry a higher debt in favor
25 of Otto Candies, which he was then able to flip for a higher

1 percentage interest.

2 So again, they may have been harmed by that.
3 There may be a duplication where there is a derivative
4 action and a direct action, but there is also a derivative
5 action at stake.

6 The eighth cause of action fraud through
7 silence in the face of a duty to disclosure is very similar,
8 both in terms of the facts that are pled, and the cause of
9 action itself for fraud through active concealment -- I'm
10 not sure what the difference is between active concealment
11 and failure to disclose through silence. I mean, to me, the
12 allegation is that there is a fraud, that they had
13 information they should have disclosed. Bad things were
14 happening. The company was looted. There was financial
15 hardship and damage to the company, which should be
16 rectified for the benefit for all of the Creditors and
17 parties-in-interest.

18 The ninth cause of action claimed for --
19 claimed against the controller shareholder Defendants for
20 wrongful equity dilution: This is phrased as if it were the
21 shareholders who were hurt by the dilution of the Debtors'
22 equity. You know, the Court has been clear in the *Dexterity*
23 case and as guided by the Fifth Circuit not to look at how
24 the claims are actually pled or how they're titled, you
25 know, what they called them, but, in fact, to look at the

1 substance of the claim itself. And the claim for dilution
2 rests on the premise that the Debtors overpaid for assets
3 sold and leased to them by Otto Candies, the same stories
4 again, and then converted that to inflated debt equity and
5 diluting the outstanding shares.

6 So they have pled it as if they were harmed
7 individually, but they weren't. And it's the company that
8 was harmed by those actions and that would make that a
9 derivative claim.

10 The tenth cause of action is for an
11 accounting and while that is a direct cause of action, it is
12 a claim against the Debtor and would be stayed by the
13 automatic stay without need of a Temporary Restraining Order
14 from this Court.

15 So Your Honor, it's a very long way of saying
16 that this Court has exclusive jurisdiction to determine what
17 is property of the estate by arguing -- by focusing the Vice
18 Chancellor Strine in the Delaware Chancery Court on whether
19 the stay applies to Debtors versus non-debtors, it skips a
20 really important issue. I think in general -- and at first
21 glance, if this were a different kind of lawsuit, if it were
22 not one that contained derivative actions, that would be a
23 very strong and compelling argument to the Court in Delaware
24 that: Why are these non-debtors reaping the benefit of an
25 automatic stay?

1 And the parties there might be left with just
2 the argument about the aggregation of claims, that there is
3 indemnity provisions that sort of -- what we call in Texas,
4 "inextricably intertwined," which they don't use in
5 Delaware, but that kind of argument. In this case, though,
6 I think the more compelling argument is that the claims
7 belong to the estate. So it's not that the actions are
8 stayed against non-debtors. It's that they very likely
9 should proceed, but they should proceed through this Court,
10 either by the Debtor or a designee of the Debtor.

11 And I think that's important. I understand
12 the Delaware Plaintiffs' argument, which they pled in sort
13 of a notice way, their response, which I also understand on
14 short notice, that you know: Why would we want the Debtors
15 to pursue this claim? I mean, you know, they are the
16 targets here, but the law says that those claims belong to
17 the Debtor and now really the Debtor is a new entity.
18 Courts recognize that Debtors are really a new and different
19 entity than the entity that existed on December 3rd and the
20 difference we have here is that I have a Creditor's
21 Committee who is very interested in these same claims, to
22 investigate them, to determine if there has been wrongdoing
23 by the officers and directors.

24 So while those claims belong to the estate, I
25 would anticipate from a lot of angles, that there would be

1 constituencies already active in this case, who may not want
2 the Debtor to have sole control or any control over those
3 claims and causes of action.

4 **THE COURT:** Didn't we displace management?

5 **MS. KURTZ:** Yes. We've got a Chief Restructuring
6 Officer. That's why I was going to say, so --

7 **THE COURT:** So forgetting the Committee for a
8 minute, we don't have --

9 **MS. KURTZ:** Correct.

10 **THE COURT:** -- the same management people?

11 **MS. KURTZ:** We do not.

12 **THE COURT:** Okay.

13 **MS. KURTZ:** We do not, although to be clear and
14 you know, Your Honor, the former President and the former
15 Chief Financial Officer are still assisting the Chief
16 Restructuring Officer, in different capacities. They both
17 are extensively helping with marketing efforts, either for
18 the sale of the vessels or for investors to invest in the
19 company for reorganization.

20 I'm not prepared to say today what the long-
21 term likelihood is of employment for those --

22 **THE COURT:** But official control is vested, as I
23 recall by our Order, exclusively in the CRO.

24 **MS. KURTZ:** And he is exercising that exclusively.

25 **THE COURT:** Okay.

1 **MS. KURTZ:** So he would either keep those, or if
2 there was substantial push back and/or an order from this
3 Court, we have had preliminary discussions with the
4 Unsecured Creditor's Committee, you know, so that they could
5 do conflicts checks, if we -- if we needed to punt that
6 particular litigation or investigation, would they be
7 prepared to take that?

8 So we believe strongly that the claims belong
9 to the estate for the benefit of all of the creditors and
10 parties-in-interest. We understand that there could be an
11 argument that the Debtor may not be the perfect person to
12 pursue those.

13 Our argument back would be: We have a Chief
14 Restructuring Officer. We have independent management
15 today. If you're still not satisfied, we have an Unsecured
16 Creditor's Committee. Those make the facts very different
17 than they were on December 3rd and prior in time.

18 **THE COURT:** All right. Mr. Paduano, what kind of
19 response do you have?

20 **MR. PADUANO:** Your Honor, thank you very much. I
21 want to make it very clear that what's pending in the
22 Delaware Court is not a derivative action. They're direct
23 claims against the Defendants there. And the Counsel has
24 correctly stated that we have disclaimed any interest in
25 anyway of pursuing anything in light of the bankruptcy stay,

1 any claims against Deep Marine Holdings, Inc. or Deep Marine
2 Technology.

3 So Your Honor, then to the extent the
4 argument and the application for this Court is based on the
5 analogous of how we've got derivative claims, it's just not
6 the case. Moreover, the reliance the Court has just heard
7 about Your Honor's decision in *Dexterity* and the Delaware
8 case that underlies that concern shareholders. We are not
9 shareholders of the Debtors. Our shares have been canceled,
10 in a word, and the Court can look at Exhibit "O" to my
11 affidavit. It shows the merger of what our interest to
12 another entity and don't have an interest right now, the way
13 the law works in Delaware, in either of the Debtors.

14 And clearly, Your Honor's decision in
15 *Dexterity* and the Delaware *Tooley* case be to shareholders
16 and then was trying to evade the automatic bankruptcy stay.
17 We're not shareholders. They and another machination, which
18 I'll get to in a second, cancelled our shares by doing a
19 short form Delaware merger.

20 And Your Honor, that gets to the point of
21 what's going on here. What's going on here, as Counsel
22 says, they asked the Delaware Court to stay our action.
23 They filed the Suggestion of Bankruptcy. That is attached
24 to Exhibit F of my Affidavit, giving notice once the
25 Delaware Court was going to allow the case to proceed,

1 actually on an expedited basis, that these entities that
2 have been merged literally out of business, were going to
3 file for bankruptcy and the Delaware Court, as Counsel
4 correctly stated, set an expedited schedule for discovery.

5 And the reason for that is that these
6 Defendants here, specifically Mr. Candies and Mr. Kazeminy,
7 the Candies' entities, Mr. Candies and Mr. Kazeminy, we
8 think seriously made misrepresentations to the Delaware
9 Court. This dispute started in the fall of 2008 when on a
10 confidential basis, a source came to our clients. It's a
11 very small corporation with very few shareholders, that
12 there was wrongdoing. Our client, under Delaware law, made
13 a demand as they must to the corporation asking that the
14 corporation investigate the wrongdoing and see if there was
15 merit to it, and we made that demand.

16 For more than five months, nothing happened
17 with that demand. In the interim, we sued. We did, in
18 fact, file a derivative action in Delaware. And the
19 Defendants met that that action with a Motion to Dismiss,
20 saying that our client was not ripe, that dismissal was
21 because the Special Committee Minister Battaglini was
22 counsel to -- Greenberg Traurig was Counsel to -- said it
23 hadn't had enough time after three months to complete its
24 work. So the Delaware Court dismissed without prejudice and
25 allow the Special Committee to complete its work.

1 The Special Committee completed its work on
2 June 30th, 2009. The next day -- there's a typo in my
3 affidavit, Your Honor. I apologize for that. The next day
4 on July 1st, 2009, our shares were cancelled -- our clients'
5 shares were effectively cancelled and there was a short-form
6 Delaware merger, which the Kazeminy entities and the Candies
7 entities were entitled to do because of their vast majority
8 holdings in this closed corporation.

9 Thereafter, Your Honor, we filed the current
10 action that the Defendants seek to have, in effect, stayed
11 because they believe in some form that it runs afoul of the
12 stay, and our claims don't. This was, as they say, the
13 Court when it takes the time to go through our papers, there
14 are a few shareholders. We identified wrongdoing. The
15 company had been valued as we pled in Delaware at more than
16 100 million dollars -- derivative transaction for more than
17 100 million dollars. On July 1st, 2009, the company's value
18 was nothing. There's a valuation that's attached in the
19 papers here. I'm sure the Court noticed a merge in
20 Exhibit O that shows their shares were worth a dollar.

21 And Your Honor, we've got serious claims
22 against these non-officers, non-directors of the bankruptcy
23 entities for what they've done to our shares. They had
24 duties to us. They have fiduciary duties to us as majority
25 shareholders, as organizers of the investment, a host of

1 duties and frankly, the reason that they wrote to your Court
2 seeking a TRO is because the Vice Chancellor Shrine is, I
3 think, going to hold her feet to the fire and say that that
4 entities that are not encompassed by the Bankruptcy Court
5 stay are entitled to that protection, and that includes
6 Mr. Candies, Jr., Mr. Candies, III, Mr. Kazeminy, DCC
7 Ventures and JK Holdings Corporation and KOC, Otto Candies,
8 LLC and obviously there's issues with the former directors,
9 who might have greater claim to the protection of this
10 Court, but I don't think that the organizers of the
11 investment. Outside investors, who were neither directors,
12 nor officers, who were employees of the bankrupt entities, I
13 don't think they get to enjoy the stay at all.

14 So we do have these direct claims because
15 they have done things that have destroyed our values.
16 Counsel has conceded that the ultimate chance we take of the
17 success on the merits by the Debtors here is nil. She just
18 said that some of these claims may be joint, even if their
19 analysis somehow they've got a derivative action in
20 Delaware, even though it's not apprised, at some point we
21 get to pursue those claims against these people who have
22 wronged us and I don't see how a stay can be issued when
23 we've got a concession that claims may be pursued at all.

24 As to the argument somehow that there's
25 irreparable injury here, these entities, as far as we know

1 in Delaware, we've been deprived of lawsuit, has no idea
2 what has happened to them at all, except for the valuation
3 that showed them at no values as of July 1st, 2009. I don't
4 know how they could possibly be injured by re-pursuing
5 claims against non-officers, directors and employees,
6 agents, in another forum at all.

7 And this concept, somehow that the claims
8 that we have regarding our shares and what was our seven
9 million dollars that we were entitled to, the value of our
10 shares before this deceit started, somehow belongs to the
11 corporation or to other creditors, I don't see that at all.
12 I don't see how they could possibly apply because again, our
13 claims don't run against the corporation. Now in light of
14 the stay, we can't pursue, but clearly against the actions
15 that Mr. Kazeminy took and Mr. Otto, the entities and others
16 that they took, we clearly get to pursue those.

17 They ran the companies as their Candy Store
18 and we got close to them and came very close to firming
19 things up in Delaware. They cancelled out shares -- a very
20 aggressive act. It clearly got the attention of the
21 Delaware Court, which is why we're on the phone today
22 because I don't know how they're going to explain that
23 result to the Delaware Court. So the concept somehow that
24 these claims should be -- our claims in Delaware should be
25 stayed and surrendered to Counsel that's being retained by

1 these two entities that were worth a dollar as of July 1st,
2 2009 because of being pursued by Counsel, that is nominated
3 by the Debtors to pursue them as to others where they're
4 speculating that at some point their bills are being paid by
5 Mr. Kazeminy and Mr. Candies, who orchestrated these
6 entities and do stuff to invest in the entities and have
7 done everything to frustrate our interest into that. The
8 concept of this claim is being pursued diligently, fairly --
9 analyzed diligently and fairly at all, so we cannot -- I
10 don't see how Counsel can possibly overcome that conflict in
11 any way.

12 So even if there were Proof of Claims
13 ultimately it wouldn't be the estate controlled by these
14 same entities that would be pursuing those claims. So, Your
15 Honor, this is not a situation where the *Dexterity* decision
16 applies. It's not something where you've got parties, us,
17 in front of you who are trying to end around the stay at
18 all. I think they've been chewed by half by cancelling our
19 shares. They began arguing that we were shareholders trying
20 to get around your stay, but we're not. We're former
21 shareholders. They kicked us out. We don't have a claim,
22 according to them if they're to be believed as to the equity
23 or debt or assets or anything of Deep Marine Holdings and
24 Deep Marine Technology and the four special purpose entities
25 that we're unfamiliar with, that are part of the action in

1 your Court. They kicked us out.

2 So we'd like to sue them, but you know, the
3 stay is there, but at the end of the day, if they're right,
4 they've short-form merged us out of our equity positions.
5 You know, we don't have a claim there. We have an appraisal
6 proceeding in Delaware that's already been commenced, that's
7 starting, that under Delaware law is supposed to go forward
8 to assign a value, their value, to our shares we would
9 clearly then say because that involved the Debtors of Your
10 Honor's Court.

11 So Your Honor I don't think there's a record
12 in front of you to take the extraordinary action of truly
13 taking away the jurisdiction of the Court in Delaware that's
14 got these claims in front of it that is dispute has been
15 kicking around in various forms and so for well over a year
16 and we have the Court in Delaware to help us. We got in the
17 Court in Delaware to expedite things because the assets have
18 been taken away from us and now we must pursue these
19 individuals.

20 Our task is quite difficult and we take this
21 as just another effort to make it that much more difficult
22 and much more expensive for our clients. So we'd ask the
23 Court to deny the TRO Application in its entirety to the
24 extent that if the Debtors want to go forward after some
25 discovery to see what actually is going on and where the

1 right to remedies actually lie after discovery, we could
2 appear back before the Court for a preliminary injunction, I
3 would ask that the most that this Court does is strike at
4 this time.

5 Thank you.

6 **THE COURT:** All right. Thank you.

7 All right. I'm granting the Temporary
8 Restraining Order and let me give the reasons why I'm going
9 to grant the Temporary Restraining Order: Actually, I
10 oftentimes deny Temporary Restraining Orders because I think
11 that we need to be extraordinarily careful in issuing one,
12 but having reviewed really the four corners of the Complaint
13 to determine what the story is, I think that the Plaintiffs'
14 view of what the Complaint says -- not maybe what it could
15 say, not maybe what somebody wants it to say, but what it
16 says unambiguously largely states claims that are property
17 of the estate.

18 I am guided today by Fifth Circuit law that
19 says that if something is arguably property of the estate,
20 that it is a violation of the automatic stay to exercise any
21 control over it or to take any action against it and I refer
22 the parties to the *Chestnut* case at 422 F.3d 298.

23 We have jurisdiction over this matter under
24 20 U.S.C. Section 1334. It is a core matter under 20 U.S.C.
25 Section 157 in determining whether to grant a Temporary

1 Restraining Order, I will follow Fifth Circuit law under
2 *Speaks versus Cruz*, at 445 F.3d 396, a 2006 Fifth Circuit
3 case, the standard for standard, substantial likelihood of
4 success on the merits, a substantial threat of irreparable
5 harm if the injunction is not granted, that the threatened
6 injury to the Movant outweighs any harm to the Non-Movant
7 that may result from the injunction and that the injunction
8 will not undermine the public interest.

9 First, is there a substantial likelihood of
10 success on the merits? My answer is that I think there's a
11 pretty overwhelming likelihood of success on the merits as
12 the Complaint is now pled. Now I think that Mr. Paduano
13 makes persuasive arguments that there may be a complaint
14 that they can file that would not violate the automatic stay
15 and when an amended complaint gets presented to me, if it
16 gets presented before the expiration of the TRO or if it
17 gets presented at the Preliminary Injunction Hearing, this
18 ruling may change and it may change very dramatically for
19 those of you that are interested in the outcome.

20 I'm ruling on this Complaint, not really on
21 the Complaint described by Defendant's Counsel. Let me just
22 go through -- and I'm not going to go through every
23 paragraph of the Complaint right now, but I'm going to go
24 through some of the Complaint and just say why I think this
25 is a fairly obvious decision. The Complaint starts off by

1 saying, "This action is filed by the victims of a conspiracy
2 to loot Deep Marine Holdings and its subsidiaries, including
3 its wholly owned subsidiary, Deep Marine Technology." It's
4 a corporate looting case. That is what is pled.

5 When I do to the causes of action, I think
6 everybody agrees that the cause of action for appraisal
7 rights is stayed. The second cause of action is a claim for
8 general breach of fiduciary duties, without really
9 describing what those breaches are, but referencing back to
10 paragraphs 1 through 148, that largely describe the looting,
11 the self-dealing, the misuse of corporate funds, and
12 describe them in way that, you know, frankly are very
13 persuasive and offensive if true. I'm obviously not
14 deciding what's true, but there is a major corporate looting
15 case is pled here.

16 When I look at the third cause of action, it
17 gets more specific than the second. Paragraph 157, however,
18 goes and says, "Otto Candies sold vessels and equipment,
19 some of which were not seaworthy and required hundreds of
20 thousands of dollars to repair to DMT at inflated prices
21 while Otto Candies was a controlling shareholder of DMT and
22 while Otto Candies, III, was a member of DMT's Board of
23 Directors. By reason of the actions described above, Otto
24 Candies and Otto Candies, III, breached their fiduciary
25 duties to DMT by engaging in a classic case of self-dealing

1 thereby looting DMT and its subsidiaries, unfairly diluting
2 minority shareholder Plaintiffs and diminishing the value of
3 Plaintiffs' DMT stock."

4 This cause of action has nothing to do with
5 the theft of the shares. It has to do with looting of the
6 corporation. The unjust enrichment is the same kind of
7 Complaint.

8 The fifth cause of action, again we don't get
9 the specifics. We're incorporate prior paragraphs, but by
10 incorporating them in each of these situations as the basis
11 for the cause of action, what the Plaintiffs rely on is
12 injury to the corporation for the measure of the damages to
13 the Plaintiffs and when they rely on injury to the
14 corporation as the measure of the damages to the Plaintiffs,
15 they are stating a cause of action that in my mind -- at
16 least arguably under *Chestnut* and I think probably more than
17 arguably, belong to the estate to bring.

18 The seventh and eighth causes of action are
19 sufficiently ambiguous that I don't know what they are.
20 Again, they incorporate the prior paragraphs. By
21 incorporating the prior paragraphs, they arguably are
22 property of the estate and that is the standard I am
23 required to follow under *Chestnut*.

24 The wrongful equity dilution, I agree almost
25 precisely with the way that Ms. Kurtz described it, which

1 although it is described as a shareholder dilution, what it
2 says is that the shareholders were diluted because assets of
3 the corporation were diverted out and by doing that, it
4 diluted the value of the shares by diversion of corporation
5 assets.

6 And finally, of course, the accounting is the
7 direct claim against the Debtors.

8 I find that as pled, every claim is either
9 actually or arguably a claim that is owned by the estate or
10 is a claim against the Debtors. I therefore find there is a
11 substantial likelihood of success on the merits.

12 With respect to a substantial threat of
13 irreparable harm if the injunction is not granted, I find
14 there is irreparable harm for two primary reasons. The
15 first is: The law holds that a violation of the stay is by
16 definition irreparable injury. So if they are violating the
17 stay by exercising control in violation of Section 362(c) --
18 excuse me, 362(a), that is, in fact, a violation of the stay
19 and it satisfies a substantial threat of irreparable harm.

20 Second, I think there is irreparable harm if
21 the injunction is not granted because in all likelihood,
22 prosecution of the cases is a void act, and if we get to a
23 prosecution and a result and it's void, that result is going
24 to create such a mess, I don't think we'll ever be able to
25 put Humpty Dumpty back together again. It just makes no

1 sense to allow it to proceed until what is pled is what they
2 have a right to proceed on.

3 Three, that the threatened injury to the
4 Movant outweighs any harm to the Non-Movant that may result
5 from the injunction. I think absolutely that is the case
6 from what I have seen. The Debtor owns these claims, at
7 least some of them without question. All of them the Debtor
8 arguably owns or the Debtor is a Defendant in. It is
9 unreasonable to believe that somebody else should be able to
10 control that without injuring the Debtor and moreover, the
11 probability that these actions would then ultimately be
12 determined to be void makes the problem even worse.

13 I frankly don't see any harm to the
14 Non-Movants under this situation. They want to proceed with
15 litigation, but they have not argued or shown me any harm to
16 them in delay other than that they want to move ahead, and I
17 understand wanting to move ahead and we're going to set
18 things relatively promptly here, but wanting to move ahead
19 does not constitute injury. There just isn't any injury
20 that at least has been argued to me of holding up, taking a
21 breath, and seeing what's going on in this situation.

22 Moreover, an awful lot of what is argued as
23 the injury has to do with the fact that "The crooks are in
24 charge of suing the crooks," is the way that I'm going to
25 put it. I don't think that's what's going on in this case.

1 One of the very first things that we did was we ordered that
2 the people that are being complained about were divested of
3 control over the case.

4 I know that the folks on the phone don't know
5 me, but I probably have a reputation down here for turning
6 down Motions to Compromise Controversies more than any other
7 judge in this state does. I do turn those down
8 unfortunately for people fairly regularly and the
9 probability of me rubber stamping a compromise that is going
10 to allow these folks to walk away in the light of -- if I
11 get a good objection to it, it's fairly low. I mean, I take
12 my 9019 responsibilities with a great deal of seriousness
13 and perhaps more seriously than some people would like for
14 me to do, but I think there probably shouldn't be a whole
15 lot of worry, that I'm going to end up rubber stamping a
16 9019 motion.

17 And I would also tell the folks, you need to
18 come oppose it. It's not that I'm just going to go out on
19 my own, but opposed 9019 motions here get treated with a
20 great deal of serious evaluation.

21 Finally, with respect to public interest, I
22 think the Fifth Circuit standard is that the injunction will
23 not undermine the public interest. I don't think this one
24 does, so I'm going to issue the Temporary Restraining Order.
25 It obviously doesn't last very long. This is the first TRO

1 that I've issued since the new rules. I don't know if it's
2 a 14-day standard or a 10, but I'm going to look it up.

3 Let me see. Fourteen days under Rule 7065 as
4 applying Rule 65(b)(2), so we need to have a hearing within
5 the next two weeks.

6 Mr. Paduano, I'd rather set this at your
7 convenience, since you're going to be traveling. Can you
8 tell me a convenient time for you during the week of
9 February the 1st and I'll try and get you a hearing on a day
10 that's convenient to you?

11 **MR. PADUANO:** It's the -- sorry, Your Honor. I'm
12 just looking.

13 **THE COURT:** And obviously, you're welcome to
14 participate by phone, but I suspect you're going to want to
15 be here.

16 **MR. PADUANO:** Yes. I will be. One second, Your
17 Honor, please?

18 **(Pause)**

19 **MR. PADUANO:** Your Honor, I take it the Court
20 still has discretion to move things out a little bit. Would
21 February the 8th work, the Monday?

22 **THE COURT:** I can go to the 8th, if you want to
23 consent to the entry of the TRO, but I can't if you won't.

24 **MR. PADUANO:** We will consent to it.

25 **THE COURT:** Okay.

1 **MR. PADUANO:** We will consent then up to the date.

2 **THE COURT:** Right. Well, you're going to consent
3 that I'm going to issue an TRO for longer than the 14 days,
4 is what you're going to consent to?

5 **MR. PADUANO:** Yeah, I understand the Court's
6 ruling is we do consent to the additional period of time,
7 yes.

8 **THE COURT:** Okay. I actually have time on the
9 8th. I think a trial must have cancelled. I'm not sure
10 why. I've got -- let me just open a couple of docket
11 settings I've got and see how time consuming they're going
12 to be. What I proposed to do is to limit each side for
13 maybe an hour and a half for their preliminary injunction
14 presentation, maybe two hours, and see if that works for
15 everybody? Does that work for both sides?

16 **MR. PADUANO:** Yes, Your Honor.

17 **MS. KURTZ:** Did -- I'm sorry, Your Honor, did you
18 give us a time on the 8th? I've --

19 **THE COURT:** Well, I'm going to look at that. I'm
20 trying to figure out, can you live with an hour and a half
21 to two hours for your presentation?

22 **MS. KURTZ:** Okay. I'm sure. I mean, two hours
23 would probably be better, but I usually go under. That's
24 fine.

25 **THE COURT:** I can give you two hours. How do you

1 look on the 8th?

2 **MS. KURTZ:** And Your Honor, I've got a motion -- I
3 know it sounds small, but I've got a Motion for Relief from
4 Stay hearing set -- let me see if that's the 8th or the 9th.
5 I apologize. Give me one minute. No, it's the 9th. I'm
6 clear on the 8th, I'm sorry. I'm clear on the 8th.

7 **THE COURT:** Let me see what I've got. If I set
8 this for 2:00 o'clock in the afternoon and then we go till
9 6:00, will that let you take a morning flight in,
10 Mr. Paduano?

11 **MR. PADUANO:** Your Honor, whatever time is
12 convenient for the Court. I'll probably be there the day
13 before.

14 **THE COURT:** We can start it -- we can start at
15 10:45 in the morning, if you-all want to. We'll take a
16 fairly -- at 1:30 I've got a hearing that's going to take
17 about 15 minutes. I've got a 9:00 o'clock. I just want to
18 be sure it's over before everybody shows up, so if you-all
19 want to start at 10:30, 10:45, and then I'll give each side
20 two hours.

21 **MR. PADUANO:** 10:30 would be great, Your Honor.

22 **THE COURT:** All right. We'll issue the TRO. I'll
23 get all the findings of fact. I've got to incorporate them
24 actually into writing, I think, under the rules for that,
25 but I will get that done. The TRO will probably go out

1 tonight. If not, it will go out in the morning.

2 We'll set the hearing for February 8th at
3 10:30 in the morning on the Preliminary Injunction. By
4 agreement, each side is going to be limited to two hours for
5 their control of court time that will include your direct
6 examination of any witness and any cross-examination. It
7 will include any opening and closing. I'll read your
8 materials beforehand to try and save you having to do an
9 opening. And we'll have the full time allotted.

10 Just be sure to reserve that time for me,
11 Ms. Smith.

12 Anything else we need to do today?

13 **MR. PADUANO:** Would the Court entertain a -- would
14 it be possible to take some limited discovery in aid of our
15 hearing?

16 **THE COURT:** Absolutely. You're entitled to all
17 the discovery that you-all can notice up and get done. If
18 you want me to compel some right now, I'd probably prefer
19 that you-all confer first and if you don't reach an
20 agreement, file a Motion to Compel and I'll get discovery.

21 **MR. PADUANO:** Great. We'll do that, Your Honor.
22 Thank you.

23 **MS. KURTZ:** The discovery, Your Honor, I just want
24 to be clear, would be in connection with the ownership of
25 the claims?

1 **THE COURT:** Well, it's going to have to be
2 connection with the merits of the preliminary injunction
3 that's being sought.

4 **MS. KURTZ:** Right. But I mean --

5 **THE COURT:** So I don't want to say it's only that
6 because, I mean, there may be some other issues. It isn't
7 obviously an underlying merits discovery, but there may be
8 things that are broader than who owns the claims.

9 **MS. KURTZ:** You answered my question in your
10 comment. Thank you.

11 **THE COURT:** Thank you. Yes, sir?

12 **MR. MOAK:** Your Honor, on behalf of the Committee,
13 obviously we're not parties to the action, but we would like
14 the opportunity to participate at the preliminary injunction
15 hearing. Obviously, Ms. Kurtz --

16 **THE COURT:** Whose side are you going to take?

17 **MR. MOAK:** We came today to speak in support of
18 Mrs. Kurtz' client, the Debtors, and we will do that at the
19 preliminary injunction hearing and we will coordinate with
20 her, so as not to duplicate our effort. In part, the reason
21 I didn't speak today, Your Honor, was because she basically
22 covered every topic that I would like to have covered,
23 but --

24 **THE COURT:** I'm not sure that you'll be a party to
25 it, but if you -- if the other side doesn't object, I'll

1 deal with it, but certainly I'm going to make you get time
2 from her, out of her two hours.

3 **MR. MOAK:** We understand, Your Honor, and we'll
4 coordinate with her. I appreciate that.

5 **THE COURT:** But I don't want to make a statement
6 today because I don't know what the other side's position
7 will be as to whether you should be allowed to participate
8 or not.

9 **MR. MOAK:** It may be then, Your Honor, in light of
10 that, we may file a Motion to Intervene. I'm just going to
11 try to give that --

12 **THE COURT:** If you file a Motion to Intervene,
13 I'll take it up at that point.

14 **MR. MOAK:** Thank you, Your Honor.

15 **THE COURT:** Thank you.

16 Anybody else need anything clarified today?

17 (No audible response.)

18 **THE COURT:** Okay. Thank you for the presentation.
19 I appreciate getting educated about this. I will get a TRO
20 out, I hope before I go home tonight.

21 Thank you.

22 **MR. PADUANO:** Thank you, Your Honor.

23 (Proceeding adjourned at 4:12 p.m.)

24

25

* * * * *

1 *I certify that the foregoing is a correct transcript from*
2 *the electronic sound recording of the proceedings in the*
3 *above-entitled matter.*

4 */s lmartin*

5

6 *JUDICIAL TRANSCRIBERS OF TEXAS, INC.*

7 *JTT JOB/INVOICE # 28061*

8 *DATE: JANUARY 25, 2010*

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25